No. 15113

IN THE

United States Court of Appeals

For the Ninth Circuit

1956 TERM

GOODYEAR FARMS, a corporation; ADAMAN MUTUAL WATER COMPANY, a corporation; B. W. MULLINS, JAMES H. SHARP, GEORGE W. BUSEY, CARLON H. HINTON and VERNA HINTON, his wife, et al,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

GOODYEAR FARMS, a corporation; ADAMAN MUTUAL WATER COMPANY, a corporation; BILL W. MULLINS and RALPH ASHBY and GRACE ASHBY, husband and wife,

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Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

CITATIONS

Cases

Cases — Continued

Statutes

Treatises

Miscellaneous

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JURISDICTION

This is an appeal from two orders entered in this proceeding in the District Court of Arizona, at Phoenix, Arizona. The action was originally brought by the United States of America to condemn the fee title to certain lands in Maricopa County, Arizona, for the United States Air Force.

The first of the orders appealed from is one wherein the Court denied the petition of 35 petitioners who sought to interevene for the purpose of recovering in the condemnation action compensation for property and property rights which were in fact taken from them by the plaintiff in the course of development and use of the property actually condemned, but which were not described in plaintiff's complaint nor included in the declaration of taking.

The second order is one wherein five defendants in the condemnation action (who had also been petitioners in the intervention proceeding) sought permission to file an amended appearance therein, setting forth their respective additional claims for compensation for property and property rights taken from them by the plaintiff, which property and rights were not described in plaintiff's complaint nor included in the declaration of taking.

The District Court refused to permit the intervention by its order entered December 29, 1955 (T.R. 184, 185) and denied the motion of the five defendants for leave to file an amended appearance alleging the full extent of taking by the government in its development of Luke Field on March 5, 1956. (T.R. 210) Notice of Appeal was filed, with respect to the order of December 29, 1955, on January 26, 1956, (T.R. 185) and with respect to the order of March 5, 1956, on March 28, 1956. (T.R. 222)

This appeal is predicated on 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

These two appeals have by stipulation been consolidated for presentation to this Court.

There are two separate legal questions involved in this consolidated appeal. One concerns the denial of a petition to intervene by 35 petitioners which, under the Rules of Procedure, may have been a denial of intervention which was a matter of right, under Rule 24(a), or the denial may have been ordered under 24(b), where the Court exercised its discretion.

The other legal question concerns the denial of the petition to file an amended appearance, by five of the defendants in the condemnation action.

While there may be some difference between the right of an intervener, who is not a party, to come into an action, as opposed to the right of one already a party to file an amended appearance, we believe many of the basic legal questions are common to both in this proceeding.

We are, therefore, filing a single brief in the interest of brevity and will discuss both questions herein.

The orders of the District Court were minute orders and read:

As to the petitioning interveners:

"It is ordered that the Motion for Intervention of Adaman Mutual Water Company, an Arizona non-profit corporation on behalf of itself and its stockholders; Goodyear Farms, an Arizona corporation; Harry A. Kandarian and Bernita Kandarian, husband and wife; Peter Nalbandian, as his sole and separate property; Joseph E. Bulfer and Mary Bulfer, husband and wife; Calvin F. Jones and Margaret Jones, husband and wife; Jonathan Thomas Rogers, a single man; Jefferson Z. Rogers, a married man; John Newton Edge and Margaret Elizabeth Edge, husband and wife; Harold Ralph Hunt and Georgia May Hunt, husband and wife; George Reismann and Joanna Reismann, husband and wife; Lee Weldon Merritt and Peggy Childers Merritt, husband and wife; Raymond F. Austerman and Zula Austerman, husband and wife; John A. Sellers and Maxine Sellers, husband and wife; Marshall E. Manley and Mary Elizabeth Manley, husband and wife; Myron M. Mitchell and Irene Mitchell, husband and wife; Henry Hallam Hestand and Martha Sue Hestand, husband and wife; Chester Elwood Hunt and Mary Virginia Hunt, husband and wife; Olliver Kissling and Peggy Jean Kissling, husband and wife; Albert C. Lueck and Melva Lueck, husband and wife; Ralph Ashby and Grace Ashby, husband and wife; Leon Fort and Doris C. Fort, husband and wife; Carlon A. Hinton and Verna Hinton, husband and wife; Roy Sheppard and Dora L. Sheppard, husband and wife; Herman Eaton and Dorothy Eaton, husband and wife;

J. Elmer Woodward and Bernice Woodward, husband and wife; Juan Brashears and Betty Brashears, husband and wife; J. L. Bunger and Kathryn Bunger, husband and wife; Leon G. Gailey, Archer W. Seaver, Ray M. Lorette, George W. Busey, B. W. Mullins, James H. Sharp and Jewell J. Stone, is denied."

As to the Defendants:

"It is Ordered that said Petition for Leave to File Amended Notice of Appearance is denied."

Basically, in summary, two questions are presented:

1. In a situation where the Federal Government files a condemnation action but fails to fairly describe all property and property rights in fact taken through the activity carried on by the government on and from the lands condemned and fails to name as defendants owners of property and property rights in fact taken by the government through the carrying on of the activity which gives rise to the condemnation action, may (or must) the owners of such property and property rights, in fact taken, intervene and become parties to the condemnation action for the purpose of securing fair compensation for their property and property rights, in fact, preempted, by the government?

2. In a situation where the Federal Government brings a condemnation action but fails to fairly describe all of the property and property rights which the government has in fact preempted through the activity giving rise to the condemnation action may (or must) a defendant therein broaden the condemnation issue as laid by the government in its complaint by appearing, not only for the property and property rights which the government has elected to recognize as taken in its complaint, but also for the connected and related property and property rights in fact taken?

SPECIFICATIONS OF ERROR RELIED UPON

I

The District Court erred in denying petitioners' Petition to Intervene in this action for the reasons:

(a) Petitioners and defendants are not adequately represented, and they will or may be bound by a judgment in the action, and

(b) Petitioners' and defendants' claims and the main actions have questions of law and fact in common.

II

The District Court erred in denying defendants' Motion to File an Amended Appearance for the reasons:

(a) Defendants may be estopped by a judgment in this action from asserting their claims for additional compensation in independent actions filed by such defendants;

(b) A defendant in a condemnation action may recover in such action all severance or consequential damages to his remaining lands resulting from the use made by the condemnor of the lands taken from such defendant.

SUMMARY OF ARGUMENT

The petitioning interveners and defendants, including Adaman Mutual Water Company, as either owners, lessees or contract purchasers of lands which are contiguous or in close proximity to the lands condemned by the United States, submit that they are legally entitled to obtain compensation from the United States in the condemnation action for damage suffered by them.

Adaman Mutual Water Company, a non-profit corporation, seeks additional compensation by reason of the reduction of 8.3% in the acreage served by it, this being the percentage of the acreage it serves which was condemned.

Continuous flights of low-flying jet planes constitute a taking of the lands underneath to the same extent as though physical possession had been taken of such lands.

The United States could not escape liability for damages to those lands over which its planes continuously fly at low elevations by merely refusing to include such lands in its condemnation proceedings.

Having instituted a condemnation action to secure certain lands for airfield purposes, owners of lands which are or will be damaged by the use to which the condemned lands are or will be put, may seek compensation in the condemnation action.

Neither Rule 71A, nor the Declaration of Taking Act prohibit the presentation by, or payment of, claims to owners of property which in fact was taken, although not described in the condemnation proceeding. Both Rule 71A and the Declaration of Taking Act contemplate that all property taken for a project shall be described and taken in a single proceeding. Neither the rule nor the statute contemplates the taking of part of the needed lands by condemnation with another portion in fact taken but not described in the proceedings; thus compelling the owners of this latter property to file actions individually to recover the damages suffered by them.

It may be the petitioning interveners did not have an absolute right to intervene. However, accepting the allegation of the petition for intervention as true, for the purpose of allowing or denying the petition, and recognizing the rights and interests of these petitioners in connection with the obligations of the United States to ultimately compensate them for any property taken, the decision of the lower court denying any relief to the petitioners was an abuse of the discretion vested in the District Court.

Those appellants who were defendants in the original proceedings take the position that they have a right to seek compensation for property taken, even though it was not described in the Declaration of Taking. They believe Rule 71A does not preclude such claims, but encourages them, and that the Declaration of Taking Act, if used, must include all of the property taken, as takings without benefit of any rule or statute are not recognized. These defendants believe they must proceed in the condemnation action with their claims for additional compensation or be barred from asserting them in an independent action.

Certainly where a portion of an individual's farm or other recognized unit of land is taken and such portion of land is there-

after used as an essential, key part of the project undertaken by the condemnor, and where the normal operation of such project materially lessens the value of the remaining lands of the owner, the owner is entitled to severance or consequential damage to reimburse him for such loss in addition to the market value of the lands taken.

In any event, petitioners in intervention and defendants appealing are faced with the possibility of a defense in further prosecuting their claims in other forums that the orders entered, since they do not specify the grounds for denying the relief sought, constitute an adjudication that, in fact, no compensable claim is shown by the pleading, which adjudication for lack of timely appeal, has become final.

Hence this appeal.

ARGUMENT

In this action the United States condemned approximately 239 acres of land in Maricopa County, Arizona, approximately 233 acres of which lie within the boundaries of Adaman Reclamation Project. The condemned land was taken and is being used for extended and improved runways and facilities of Luke Air Force Base at Litchfield Park, Arizona.

The Adaman Project obtains water for the irrigation of the lands therein from Adaman Mutual Water Company, a non-profit corporation, which is owned by the owners of the lands within the Project. The Project originally and prior to this condemnation consisted of approximately 2831 acres. (Petition for Intervention, paragraph III, T.R. 41 et seq.)

Some of the lands within the Project are owned in fee, some are held under contracts of purchase and some are occupied under leases from the owners thereof. (T.R. 43 et seq.)

The petitioners and defendants therefore consist of the Adaman Mutual Water Company, which claims damages because of reduction of the acreage of the Project by approximately 8.3%;

Goodyear Farms, an Arizona corporation, as a landowner, and various individual owners, contract purchasers and lessees of lands adjacent to the runways and the lands condemned. The lands of all petitioners and defendants lie within the Project. Of the 35 petitioners for intervention, 6 also appear as defendants in the original condemnation proceeding. Other than Adaman Mutual Water Company and Goodyear Farms, 9 petitioners for intervention are owners of the fee title to their lands; 14 are contract purchasers; 8 are lessees, and 1 owns the fee title to land and is also a contract purchaser of other land; and 1 owns the fee title to land and is also a lessee of other land. (Petition for Intervention, paragraph V, T.R. 42 et seq.)

CLAIMS OF DAMAGE

The claims for damages of the petitioners and defendants are divided into two classes. For want of better designations, these are referred to in the Petition for Intervention and Motion to File Amended Appearance as "Eight Percent Taking" and "Aircraft Taking." They may be briefly described as follows:

"EIGHT PERCENT TAKING." The Adaman Mutual Water Company serves only Project lands. All stock is owned by owners of Project lands in proportion of the acreage owned by each. The stock is appurtenant to the land and is transferred when the land is sold. Neither the stock nor the land may be transferred independently of the other. The original cost of the Company's wells, canals, ditches, pumps, etc. and the costs of maintenance and operation are liens upon the lands and the stock. Because the United States has taken approximately 8.3% of such lands with the stock automatically following the land and because of the refusal of the United States to assume the obligation to pay this percentage of these annual maintenance and operation charges, the remaining 91.7% of such lands and stock are left with this added burden. These charges will not be decreased by reason of the decrease in the area of the Project. (Petition for Intervention, paragraph IX, T.R. 50 et seq.) There are no lands which can be added to the

Project to take the place of the condemned lands. (T.R. 49, Par. VIII, Petition for Intervention)

"AIRCRAFT TAKING." The take-offs and landings of approximately 400 jet planes per day have damaged the adjacent lands of the petitioners and defendants in varying degrees from a high where lands immediately adjoining the runways have become unfit for any purpose, to a low of minor damage where lands are sufficiently removed from the runways to be less affected by such flights. The character of the damage is a "taking" because the land has been made unfit or less fit for its intended and historic uses thereby. (Petition for Intervention, paragraphs XI - XIV inclusive, T.R. 51 et seq.)

PETITIONERS' AND DEFENDANTS' THEORY OF THE CASE

The United States has condemned and taken certain lands in order that Luke Field runways may be extended to make possible take-offs and landings by jet planes. The obligation to pay for the land comprising the runways and of which physical possession has been taken is admitted by the United States, but no such obligation is admitted as to the land over which the planes fly at an elevation as low as 10 feet when they leave the condemned land.

It is the petitioners' and defendants' position that this land over which several hundred jet planes fly almost daily at heights as low as 10 feet is just as completely taken as that which underlies any portion of the surfaced runways. If this be true then the taking of or damage to other adjacent lands over which the planes fly at higher elevations (yet elevations low enough so as to still substantially diminish the usefulness of the land) becomes only a question of the degree of such taking or damage.

It has long been recognized that if the air space above a landowner's property is used in such fashion as to interfere with his beneficial use of his land, a trespass results. *(Hinman vs. Pacific Air Transport,* 9th Circuit, 84 F. 2d 755.) Some other decisions

are: *Guith vs. Consumers Power Co.,* 36 Fed. Supp. 21; *Cory vs. Physical Culture Hotel,* 14 Fed. Supp. 977; *Vanderslice vs. Shawn,* 27 A. 2d 87 (Delaware); *Burnham vs. Beverly Airways,* 42 N.E. 2d 575 (Mass.); *Restatement of Torts,* Sec. 159; *Brandes vs. Mitterling,* 196 P. 2d 464, 67 Ariz. 349; *United States vs. Causby,* 328 U.S. 256, 90 L. ed. 1206, 328 S. Ct. 256. The facts in each case determine whether substantial taking or damage has been done to the landowner. There can be no doubt that flights of modern jet airplanes at the rate of one or more a minute for several hours each day would be more than a mere trespass and would substantially damage the land adjoining the end of the take-off runway from which these planes fly.

Whether this constitutes a taking, whether it is classed as an easement or whether it is designated by some other name, the landowner suffers direct and measurable damage to his property for which he is entitled to be compensated. In any event the constant flights across properties in such manner as to deprive the owners of profitable use thereof would constitute an appropriation of their properties for which compensation should be made. *Portsmouth Harbor L & H Co. vs. U.S.,* 67 L. ed. 289, 39 S. Ct. 399, 250 U.S. 1; *United States vs. Causby,* supra.

Petitioners and defendants also allege that the cost to the Project of supplying water to the remaining lands in the Project will be substantially the same as before 8.3% of such lands were removed therefrom. The Project was originally designed to operate as a unit, so that the number of miles of laterals and ditches to be maintained will be substantially the same, as will the number of wells, pumps and motors to produce the water for irrigation and domestic purposes. Thus the remaining 91.7% of the lands of the Project will be subjected to the burden of paying the additional 8.3% of the maintenance costs formerly borne by the lands taken by the United States. (Petition for Intervention, paragraphs IX and X, T.R. 50.) That compensation for this taking may be had in this proceeding is supported by the following cases: *United States vs. Certain Lands at Great Neck,* 49 Fed. Supp. 265; *United States*

vs. Certain Parcels of Land in Fairfax County, 89 Fed. Supp. 567 and 571; 196 F. 2d 657; *United States vs. Aho,* 68 Fed. Supp. 358; *United States vs. Florea,* 68 Fed. Supp. 367; See also *United States vs. 11.06 Acres of Land,* 89 Fed. Supp. 852.

We are unable to determine the specific grounds upon which the District Court based its two orders wherein it denied the petition for intervention and the motion to file an amended appearance, as the grounds for the denials are not indicated in the orders.

Granting or denying intervention under certain conditions is a matter within the sound discretion of the District Court and under other conditions intervention is a matter of right. (Rule 24, Rules of Civil Procedure for United States District Courts) However, the right of a landowner to recover severance or consequential damage to his remaining lands may not be denied if in fact such damage exists and was occasioned under circumstances giving rise to a legal obligation on the part of the condemnor to pay therefor. *Boyd vs. United States,* 222 F. 2d 493, C.C.A. 8)

It appears from the Complaint (T.R. 3), the Declaration of Taking (T.R. 14) and judgments relating to the various described tracts of land taken, totaling 239 acres, that Goodyear Farms was the owner and either the lessor or seller under a contract of sale of tracts numbered 113, 114, 115, 116, 117 and 118 totaling 212.63 acres. (Map, T.R. 74)

It further appears from this map of the airfield attached to the Petition for Intervention that these tracts and particularly tracts 114, 115 and 116 were used by the Air Force for the construction thereon of approximately 2600 feet of one runway, if the scale on such map of 1320 feet to one inch is accepted as correct. (Tract 114 is described as 37.95 acres of N½ SE¼ of Section 7 and tracts 115 and 116 as S½ SE¼ and N½ NE¼ of Sections 7 and 18 respectively.) (T.R. 6)

It also appears from this map that Goodyear Farms is the present owner of tracts described thereon as numbers 16, 17, 19,

21 and 22, and is either the lessor thereof or the seller under a contract of purchase.

In defendants' amended notice of appearance, (T.R. 191) defendants, including Goodyear Farms, claimed and sought damages for a diminution in value of its remaining lands by reason of the severance therefrom of the taken lands and by reason of the use made of such taken lands for the construction thereon of approximately one-half mile of runway for the airfield.

The United States filed objections to petitioners' intervention in the District Court, and assuming that the Court's orders were based upon one or more of these objections, we will discuss them with other matters included in this brief.

OBJECTIONS OF UNITED STATES

The principal objections made by the United States to intervention by the petitioners before the District Court were the following:

1. THE PARTIES SEEKING INTERVENTION HAVE NOT ALLEGED ANY OF THE ESSENTIAL GROUNDS FOR INTERVENTION AS SET FORTH IN RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS.

2. THE COURT IS WITHOUT JURISDICTION TO GIVE THE RELIEF SOUGHT BECAUSE THE PARTIES SEEKING INTERVENTION ARE IN EFFECT ATTEMPTING TO MAKE A COUNTERCLAIM AGAINST THE UNITED STATES OF AMERICA IN THAT THEY SEEK A JUDGMENT COMPELLING PAYMENT OF JUST COMPENSATION FOR PROPERTY NOT INCLUDED IN THE DECLARATION OF TAKING.

3. RULE 71A OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS ESTABLISHING PROCEDURE IN CON-

DEMNATION OF PROPERTY IN SECTION (E) THEREOF PRECLUDES ANY PLEADING OTHER THAN COMPLAINT AND ANSWER THERETO.

4. THE ALLEGATION THAT INTERVENTION IS THE ONLY PROCEDURE BY AND UNDER WHICH RELIEF CAN BE HAD IS WITHOUT MERIT.

The United States claimed in the Court below that Adaman Mutual Water Company, a non-profit corporation, (hereinafter sometimes referred to as "Adaman") is a defendant and that a petition to intervene must show affirmatively that intervention is reasonably necessary to protect petitioners' rights.

Appellants in reply, call attention to the fact that Adaman, which was the owner in fee of certain lands which were taken, also claims an additional right to compensation for its loss described as the "8.3% Taking." This latter taking was not included in the Declaration of Taking filed by appellee.

Other defendant petitioners whose lands were also included in the Declaration of Taking appeared and claimed damages by reason of aircraft flights over their remaining lands. Still other petitioners who were not parties to the original motion also claimed compensation for similar takings. (Petition for Intervention, paragraph V, T.R. 42 et seq.)

All petitioners, including Adaman, have alleged these and other facts, which if accepted as true for the purpose of petitioners' motion, certainly show affirmatively that intervention is reasonably necessary for the protection of all petitioners' interests.

No stockholders of Adaman as such seek intervention on behalf of the Company as the Company proposes to represent all of its stockholders. (Petition for Intervention, paragraph V, T.R. 42 et seq.)

Appellee also relied upon Rule 24(a) 3, that to intervene as a matter of right the applicant must be so situated as to be adversely affected by a distribution of the property in the custody of the

court, and that petitioner's interest be such that he will gain or lose by the direct operation of the judgment. It must be recognized that 7 of the 16 tracts of land referred to in the Petition for Intervention are owned by defendants in the original action. These petitioners, with their co-petitioners, sought damages for "takings" which were not described or admitted in the Declaration of Taking but which arose solely by reason of the taking and the use which appellee has and will continue to make of the land taken under the Declaration of Taking.

That the original defendants have a vital interest in the disposition of the condemnation fund is obvious and that the other petitioners who have and will continue to suffer damage to their lands and property by reason of the taking and the subsequent use of the lands taken, appears equally obvious because if they fail to make their claims in this action they may well be barred from instituting independent, individual actions at some later date and under some other statute.

Intervention may also be allowed under Rule 24(b) 2, when "Applicant's claim or defense and the main action have a question of law or fact in common."

Since petitioners' claims arise out of the condemnation proceeding and result from the single Declaration of Taking by the United States, a common question of law and fact exists.

All damage suffered by all defendants and all petitioners is occasioned by the occupation and use of the condemned land as an airfield for the take-off and landing of jet aircraft. Some petitioners were damaged by having the physical possession of their lands taken and the fee title transferred to the plaintiff. Some petitioners have suffered loss of use of their lands without loss of title. Adaman has lost the right to assess those lands, the title to which has passed to the plaintiff.

However, except for Adaman, the damage in each instance is of the same character; it is occasioned by the same source and only differs in degree as to the various individuals. Even as to

Adaman, the damage, though of a different character, is occasioned by the same set of circumstances and events.

Under Rule 71(b) the plaintiff may join in the same action one or more separate pieces of property without regard to ownership or the use to be made thereof.

Under Subdivision (c)(2) the complaint must describe the interests to be acquired and as to each separate piece of property a designation of the owner. Provision is also made that prior to any hearing all persons *having* or *claiming* an interest whose names can be discovered *by search* or *otherwise* shall be added as defendants.

Under Subdivision (d)(1) defendants subsequently added shall be served with process identifying the property and interest to be condemned and under (e) defendants are allowed to answer and shall identify the property claimed by the answering defendant, the nature and extent of the interest claimed and state all defenses and objections to the taking of his property.

Subdivision (f) allows liberal amendments by the plaintiff, as many times as desired before trial of the issue of compensation and (i) provides the conditions under which plaintiff may dismiss the action.

The obvious purpose of this Rule is to condemn in a single proceeding all properties which are to be used in the proposed government project.

In commenting on Subdivision (b) the 1948 report of the Advisory Committee to the Supreme Court said:

"COMMITTEE NOTE OF 1948

"*Note to Subdivision (b).* This subdivision provides for broad joinder in accordance with the tenor of other rules such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restriction that only properties may be joined which are to be acquired for the same public use would also cause difficulty.

For example, a unified project to widen a street, construct a bridge across a navigable river, and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses. Yet it is eminently desirable that the plaintiff may in one proceeding condemn all the property interests and rights necessary to carry out this project. Rule 21 which allows the court to sever and proceed separately with any claim against a party, and Rule 42 (b) giving the court broad discretion to order separate trials give adequate protection to all defendants in condemnation proceedings."

Moore's Federal Rules and Official Forms (1951) Pg. 344.

The same thought is expressed by *Barron and Holtzoff* where these writers say:

"Numerous amendments to the complaint, without burdening the court with applications for leave, are permitted because of the number of persons who may be interested in the property and the likelihood that new parties will have to be added and new issues stated, perhaps many times."

1944 *Pocket Part 3, Barron & Holtzoff Federal Procedure and Practice* Section 1952.

The same writers in discussing the dismissal of a Declaration of Taking proceedings state:

"Thus, if plaintiff has filed a declaration of taking under the statutes discussed in section 1526, the action cannot be dismissed without defendant's consent, but the court must award just compensation for the possession, title or lesser interest taken. The purpose of this provision is to avoid circuity of action which would result if the action were dismissed and the defendant remitted to another court, such as the Court of Claims, to recover just compensation for the property right which plaintiff had taken."

3 *Barron & Holtzoff* (*Pocket Part*) Pg. 120.

The Advisory Committee to the Supreme Court also stated in their Report that:

"Rule 71-a is not intended to and does not supersede the Act of February 26, 1931, 40 U.S.C.A. Secs. 258a-258e, which

is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in Court."

3 *Barron & Holtzoff* (*Pocket Part*) Pg. 211.

This proceeding having been initiated under the above referred to Declaration of Taking Statute, makes it appropriate to briefly examine this law.

The Act provides:

"In any proceeding . . . for the acquisition of any land or easement or right of way in land, . . . the petitioner may file . . . a declaration of taking . . . 'showing' the estate or interest . . . taken."

"Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto . . . title to said lands . . . shall vest in the United States of America . . . and the right to just compensation for the same shall vest in the persons entitled thereto; *and said compensation shall be ascertained and awarded in said proceedings and established by judgment therein* . . . The Court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable."

Here again there appears a clear intent that a taking shall be a single proceeding with all interests necessary to complete a project described and the compensation ascertained and awarded in the proceeding and established by a judgment in such proceeding.

Referring to Title 50 U.S.C.A. Sec. 171, 171a wherein provision is made for acquisition of lands for military purposes, authorization is given for,

". . . condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for . . . (military purposes) . . . such proceedings to be prosecuted in accordance with the laws relating to suits for condemnation of property . . .".

In Title 10 U.S.C.A. 1343a provision is made for acquisition of land by the Secretary of the Air Force, who may

". . . purchase the same by agreement or through condemnation."

Even a brief examination of all of these Acts, including the Declaration of Taking Act when read in conjunction with Rule 71A, leads to the conclusion as expressed by *Barron and Holtzoff* that the purpose is to avoid circuity of action. Also to use the condemnation law for the purpose for which it was intended, that is to compensate all owners of property which is taken in the condemnation proceeding in that proceeding.

These acts all refer to taking property by condemnation. Not to taking it by appropriation, where the owner is forced to seek relief through the *Tucker Act* or in the Court of Claims. If a department is authorized to "condemn" property that is the measure of its authority which may not be extended to acquisition in any other manner.

The Declaration of Taking Act and Rule 71A provide for a description of the property "taken". Certainly this may not be construed to mean only the property which the plaintiff wishes to describe as taken when in truth and in fact other property of other owners is taken.

If this construction is to be placed on those statutes their whole purpose and meaning will be changed with the result that innocent property owners will be forced to embark upon litigation which may have to be settled in Washington.

It would also seem incredible that the United States would seek to compel the filing of 35 actions against it which would require all of the attendant pleadings, preparation for trial and trial thereof, when it is possible to dispose of all these claims in a proceeding now pending before the District Court.

The expressed purpose of Rule 71A is to describe all interests to be condemned, to add as defendants all persons *having* or *claiming* an interest in the property whose names can be learned

by search or otherwise, and these must be served and allowed to answer. All individual owners are entitled to appear and be heard. *Gwathmey vs. United States,* 215 F. 2d 148, (C.C.A. 5)

Those who seek to take or deprive owners of their property for public purposes must follow scrupulously the law which permits such action. *General Box Co. vs. United States,* 107 Fed. Supp. 981.

It appears obvious that this procedure was adopted to save time and expense and to avoid a multiplicity of suits. This was recognized in *State of California vs. United States,* 153 F. 2d 558, (C.C.A. 9)

Petitioners and defendants believe that a distinction may be made between those cases where separate estates exist and the condemnor takes only one or more of several of such estates and those cases where the entire fee title is taken and still other cases where the estate taken requires additional estates for its use in the manner contemplated.

A mortgagee, a lien holder or a lease holder is a proper party where the fee title is sought. For the same general reason where in construction of dams, levees or reclamation projects other lands even though not adjacent are necessarily damaged by raising water above the highwater mark, the owners of such lands are proper parties, and are compensated for their loss in the condemnation proceeding.

Other cases indicate that where there is a dispute between two parties over the ownership of some portion of the condemned property or a dispute as to the division of the fund, such are not necessary or proper parties to the action and such dispute should be settled in a separate action.

Where, however, as here, property is taken for a use which use it is known in advance will damage other properties, not by raising the water level above the highwater mark but by flying planes at an extremely low elevation, both the condemned and uncondemned properties are taken simultaneously.

The Supreme Court of the United States in *United States vs. Petty Motor Co.,* in discussing the case of *United States vs. General* Motors, 323 U.S. 373, 89 L. ed. 311, 65 S.Ct. 357, where temporary occupancy was taken of a part of a leased building said:

> "Thus the Court applied a rule of compensation to the case of carving out a temporary or short-term use from a longer term very different from that generally applicable when the owner's entire interest is taken. The purpose and basis for this were to give substance, in practical effect to the Amendment's explicit mandate for payment of 'just compensation' in cases of such extraordinary 'takings' and to prevent those words from being whittled down by legalistic construction into means for practical confiscation."

United States vs. Petty Motor Co., 327 U.S. 372, 90 L. ed. 729

Forcing 35 petitioners and 5 defendants to file separate actions to obtain just compensation for damages suffered may not amount to "practical confiscation" but we believe it violates not only the spirit but the letter of the Constitution.

This principle was given recognition by the District Court of Northern California where it was said:

> "The power of the court to award compensation for the actual taking, is not limited to what is sought *in this proceeding* to be taken, nor is the City relegated to relief therefor in other forums, e.g., The Court of Claims. United States vs. General Motors Corp., 323 U.S. 373, 89 L. ed. 311, 156, A.L.R. 390 * * *
> "In passing it should be noted that the scope of intangible rights compensable in condemnation proceedings, is being steadily broadened in decisions of the Supreme Court. See United States v. Causby, 66 S.Ct. 1062." (Emphasis by the Court)

United States vs. 4.105 *Acres of Land,* 68 Fed. Supp. 279.

In the above consolidated action the United States sought condemnation of two parcels of land of 4.105 and 100 acres respectively for use in sinking wells to obtain water from a subterranean basin thereunder. The City (San Francisco) owned

other lands over the same basin which it had previously acquired when it bought out a water company. The United States contended it had not taken nor did it seek to take any property or property right of the City. In each condemnation action the City appeared and was allowed to make its claim to waters in the basin.

While there are several different classes of petitioners we believe there is little if any distinction between them as to their right to present their claims before the District Court.

Certainly those who were already defendants should have such right and whether their petition was to be treated as one in intervention or as an answer makes but little difference. Whether the petition was subject to a motion to strike any portion thereof also was of little moment.

As to the other petitioners who are not defendants, their right to appear stems from the facts set forth in the Petition for Intervention, which for the purpose of this proceeding must be taken as true. *Clark vs. Sandusky,* 205 F. 2d 915. (C.C.A. 7) Forcing each of them to file a separate action would be as much a violation of orderly procedure as was the fact situation discussed in *California vs. United States,* supra, where the state of California proposed to appear in separate proceedings for damages to its highways in front of each of 270 lots.

The United States below in objection to the Petition for Intervention discussed a number of legal propositions under a general objection wherein it asserted:

> The Court is without jurisdiction to give the relief sought because the parties seeking intervention are in effect attempting to make a counterclaim against the United States of America in that they seek a judgment compelling payment of just compensation for property not included in the Declaration of Taking.

Here the United States adopted the position that the petitioners were attempting to assert a counterclaim for damages for property *not included* in the Declaration of Taking, which appellee stated may not be done.

This presents the principal legal issue involved in this action and may be stated as follows:

> May the United States by a Declaration of Taking, take certain lands when by reason of such taking and the declared purpose for which such lands will be used, adjoining lands are rendered valueless or less valuable, without permitting the owners of such adjoining lands the right to intervene in the action and make claims for their damage?

Using other language and stating the question more broadly:

> May the United States by omitting from a Declaration of Taking, property which in effect is actually taken, successfully eliminate all consideration of that property and thereby force the owner or owners thereof to seek relief in separate actions against the United States?

If there are, as here, a number of separate owners, each would be forced to file his individual action.

We cannot believe that either law or equity compels the adoption of such procedure.

The liability to compensate the owner of property condemned is clear, whether the condemnor is the United States or some other party having the right of Eminent Domain.

> "Generally compensation must be made for all kinds of property, and every kind of right or interest in property which has a market value."
>
> 29 *CJS Eminent Domain* Sec. 104 Pg. 907.

A "taking" of property may consist of an interference with the right to the use and enjoyment thereof. *29 CJS Eminent Domain,* Sec. 110, pg. 917; *In re Forsstrom,* 38 P. 2d 878, 44 Ariz. 472; see cases cited *supra re "Aircraft Takings."*

If the foregoing is true, that is, if property rights generally must be paid for, and if interference with the use and enjoyment of property constitutes a "taking" and that continuous low flying aircraft constitute an interference with the use and enjoyment of one's property, then owners of such rights are proper parties to

this action. We also believe Adaman's right to compensation is equally clear.

We agree with the general principle that counterclaims may not be filed against the government but also believe this principle is not applicable to the case at bar.

The Circuit Court of Appeals for the Tenth Circuit had a somewhat similar situation wherein lands were condemned in 1943 by the government for a term from year to year during the emergency and for three years thereafter at the election of the United States. In 1950 the owner filed a petition for Removal of Structures and Restoration of Possession, seeking among other things, if the government was to continue in possession, an order fixing a fair present compensation to the owner. The Circuit Court in part said:

> "Appellee undertakes to support the Court's conclusion upon the broad principle that the United States cannot be sued without its consent. As applicable here this contention is fallacious. Appellant has not sued the United States. It has only sought to have its rights determined in and under the statutory proceeding brought by the Government. When the Government came into court it stood in the same position as any other suitor. See Mountain Copper Co. v. United States, 9 Cir., 142 F. 625, 629; B. C. Shevlin Co. v. United States, 9 Cir., 146 F. 2d, 613, 615." *Stroh Brewery Co. v. United States* 196 F. 2d 899, Page 900, Par. 9.

This Court has held that a lienholder of street improvement bonds, while not a necessary party is a proper party to a condemnation proceeding and must be protected in some practical manner. Such a claim would certainly not be a counterclaim. *Thibodo v. United States* 187 F. 2d 249.

Even a casual reading of the cases discussing this subject shows that as to condemnation actions there has been some confusion because of different fact situations. Appellee in the court below cited such cases as *Oyster Shell Products v. United States* where the Circuit Court of the Fifth Circuit held that a pleading denominated

as a "counterclaim" was properly stricken by the District Court, where it sought compensation for lands "taken" which were not included in the Declaration of Taking for flood control purposes, on the ground that such constituted an action against the United States where it had not consented to the suit.

However, the District Court refused to strike from the answer the allegations contained therein referring to land not described in the Declaration of Taking. Contrary to the assumption of appellee both the District and Circuit Courts here held that damages to contiguous land may be recovered in the condemnation proceeding. The syllabus in 100 Fed. Supp. 378 correctly states the conclusion of both Courts where it says:

> "In proceeding by the United States to condemn land for floodway purposes, owner, in addition to compensation for the land taken, may recover for damages to contiguous land caused by the use to which the land taken has been put."

The Fifth Circuit again two years later had before it an action wherein the United States condemned 111.44 acres of filled and submerged lands and where again an owner of condemned and uncondemned lands sought compensation for diminishment in market value of the untaken lands, the Court held that the untaken lands lost certain riparian rights for which the owner should be compensated in the condemnation action. *United States v. 11.48 Acres of Land* 212 F. 2d 853.

> In this case the Court found that:
> "It affirmatively appears that this diminution in value of the uplands does not result from a taking of the uplands, but that the right, if any, to be compensated for such diminution of value arises, 'by reason of the taking of the riparian rights appurtenant thereto,' which as we have shown are rights in the submerged lands taken. . . . For such taking the Fifth Amendment guaranteed to the appellee the right to just compensation."

Appellee also cited *State Road Dept. of Fla. v. U.S.* 166 F. 2d 843, wherein the Fifth Circuit Court, held that the State Road Dept. of Florida could not obtain compensation for damage to a

portion of a highway alleged to have been taken and exclusively used by the United States; however, in this case the petition excluded "all rights of way, deeded or acquired for public roads thru this tract."

We wish to refer to some of the cases wherein this question has been either directly or inferentially passed upon by various courts.

The owners of lots which carried easements in a sewer system were allowed to intervene. *United States v. Certain Parcels of Land* 89 Fed. Supp. 567 and 571; 196 F. 2d 657.

The United States condemned the fee title to certain land on which the claimant possessed the right to cut timber. The Fifth Circuit Court allowed the claimant to intervene and held the compensation to the landowner did not include compensation to the timber owner and compensation to him was allowed. *J. Herbert Bate Co. v. Pine Land Co.* 132 F. 2d 925.

Where the court vested title in fee in the United States subject only to highway easements, Cemetery Company's easement for drainage sewer lines across condemned land, gave it the right to appear and claim compensation. *United States v. Sunset Cemetery Co.* 132 F. 2d 163. (C.C.A. 7)

Where the United States sought condemnation of .8677 of an acre of City property for a recreation center, adjoining property owners could intervene "as persons injured in kind different from others. Citing cases." *United States v. .8677 Acre of Land,* 42 Fed. Supp. 91.

Where property owners each acquired an easement with their purchase of their lots in a restricted park over certain streets with the obligation of each to pay his proportion of the maintenance costs of the park, they were allowed to intervene when 42% of the park was condemned by the United States and compensation was proper for the streets taken and also for loss of revenue for maintenance of the park by reason of 42% being taken. *United States v. Certain Lands* 49 Fed. Supp. 265.

Where lands in a drainage district were taken by condemnation, government was liable for assessments for construction and maintenance and district was a proper party. *United States v. Aho* 68 Fed. Supp. 358. Substantially the same facts and decision appear in *United States v. Florea,* 68 Fed. Supp. 367. Also see *United States v. Aho* 51 Fed. Supp. 137.

Where an access road was condemned but no part of the land owner's land was taken, he nevertheless was entitled to compensation for his loss of access in the condemnation action. *Schiefelbein v. United States,* 124 F. 2d 945. (C.C.A. 8)

Where the United States sought the return of an airplane given to a public school which was later sold to a private party, the court compared the action of the plaintiff (the United States) to an action in Eminent Domain, allowed the counterclaim of the new owner and allowed a judgment against the government. *United States v. Finn,* 127 Fed. Supp. 158.

In effect the appellee argued that certain specified lands have been taken and any damage to any other lands may not be compensated for in this proceeding. The petitioners submit that the expressed purpose for which the condemned lands were taken shows on its face that adjacent lands were to be damaged and were in effect also taken by the condemnation.

Appellants point out that if lands are taken for a use which in itself requires the exercise of an easement over adjacent lands, such easement is not a new or different "taking" any more than is the "taking" of a "flowage easement" as applied to the owners of lands riparian to a river, where compensation for such takings is made in the condemnation proceedings. *United States v. 2979.72 Acres of Land* 218 F. 2d 524 (C.C.A. 4). *United States v. Wabasha-Nelson Bridge Co.* 83 F. 2d 852. (C.C.A. 7) *United States v. Chicago B&QR Co.* 90 F. 2d 161. (C.C.A. 7) See also *United States v. Dickinson* 91 L. ed. 1789.

That flights of jet planes across and over the lands of petitioners constitute a "taking" is established. *United States v. Causby,*

90 L. ed. 1206. And that the United States has recognized this liability by condemning easements for this purpose is also apparent. *United States v. 26.07 Acres of Land* 126 Fed. Supp. 374; *United States v. Theimer* 199 F. 2d 501.

We believe the facts in the case at bar are analogous to *United States v. 11.48 Acres of land* 212 F. 2d 853 (supra) where land not described in the petition was considered in the condemnation and compensation for riparian rights attached to such untaken land was allowed. Even the stated purpose of the condemnation was considered by the court as bearing on the owner's damage. Here the rights of defendants and other interveners are just as completely taken as though runways had been constructed thereon. *United States v. Causby,* supra.

In *Boyd v. United States,* supra, the Circuit Court for the Eighth Circuit discussed the general rules relating to the right to compensation not only for the market value of the land taken but for damage to the remainder, due to the use to which the part appropriated is to be devoted. This case involves condemnation of land for an airfield and while the court denied the right of recovery to the claimant for depreciation in value of his remaining land, the principle is recognized and we believe is clearly applicable, at least to defendant Goodyear Farms, the original owner of 212.63 acres of the 239 acres taken under the Declaration of Taking. For the same reason it would appear that this principle would equally apply to defendant Adaman Mutual Water Company.

The right to compensation for taking lands adjacent to water development projects is fully discussed in *United States v. Twin City Power Co.* 215 F. 2d 592 (C.C.A. 4)

We have here a number of property owners, part of whom are already defendants, claiming that they have had valuable property rights taken by reason of this condemnation. They allege, not that they will suffer incidental or consequential damage, but that they have suffered a direct taking of valuable property rights for which they seek compensation in this proceeding.

We believe the language of the Circuit Court of the First Circuit is most appropriate.

"Upon condemnation the condemnor is vested with a complete title and all interests in the property taken are extinguished. A. W. Duckett & Co. Inc. v. United States, 1924, 266 U.S. 149, 45 S. Ct. 88, 69 L. Ed. 216; United States v. Dunnington, 1892, 146 U.S. 338, 13 S.Ct. 79, 36 L. Ed. 996. All persons having any interest in the property taken are necessary parties to the condemnation proceedings. See 2 Lewis, Eminent Domain, 3rd Ed. 1909, 1909, Sec. 515, p. 935. . . . . The right to compensation carries with it the right to be heard upon the important question of the value of the property taken and the damages caused. North Laramie Land Co. v. Hoffman, 268 U.S. 276, 284, 285, 45 S.Ct. 491, 69 L. Ed. 953; Bragg v. Weaver, 251 U.S. 57, 59, 40 S. Ct. 62, 64 L. Ed. 135; Londoner v. City & County of Denver 210 U.S. 373, 378, 28 S.Ct. 708, 52 L. Ed. 1103." *Silberman v. United States* 131 F. 2d 715 (supra) Page 717.

There can be but little doubt that these appellants had an interest in the property taken and if this be true certainly they had an interest in the value of that property, and the damage caused. *Hopkins v. McClure* 148 F. 2d 67 (C.C.A. 10) *United States v. Adamant Co.* 197 F. 2d 1 (C.C.A. 9)

The determination as to whether a petitioner is permitted to become a party to a condemnation proceeding appears to be largely a matter within the sound discretion of the court and is to a great exent governed by the facts in the individual case.

This general principle has been well stated by the Circuit Court of Appeals for the Fourth Circuit where that Court said:

"Nothing seems better settled than that an application of an intervener seeking to be admitted as a party to a pending cause is addressed to the sound discretion of the Court, ..."

Board of Drainage Comrs. v. Lafayette Bank 27 F. 2d 286, 293.

The District Court in 102 Fed. Supp. 691 (supra) said:

"As a matter of justice and thorough administration of the law, where all the persons interested have not been made parties to the proceeding, the court may allow them to intervene or be made parties. United States ex rel. and for Use of Tennessee Valley Authority v. Powelson et al., Cir., 118 F. 2d 79; 29 C.J.S., Eminent Domain, Sec. 237."

This Court said in *United States v. Adamant Co.*:

"It is an elementary principle in the law of condemnation, whether exercised by the government of the United States or by state or public bodies, that all persons having any interest in the property be made parties defendant. Nichols on Eminent Domain 3rd ed. 1950, Vol. 2, Secs. 5.1 - 5.3; 29 C.J.S., Eminent Domain, Sec. 236; United States v. Dunnington 1892, 146 U.S. 338, 13 S.Ct. 79, 36 L.Ed. 996; Minnesota v. United States, 1939, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; United States v. Sunset Cemetery Co., 1942, 7 Cir., 132 F. 2d 163, 164; State of Nebraska v. United States 1947, 8 Cir., 164 F. 2d 866, 868; California Code of Civil Procedure, Secs. 387, 389, 1246."
United States v. Adamant Co. 197 F. 2d 1, Cert. denied 97 L. Ed. 698.

In its memorandum the United States pointed out that Congress and not the courts declares what lands or interest in lands are necessary for public use and that when this power is delegated to an administrative officer, his determination is not subject to judicial review.

We have no quarrel with these principles and find no conflict in their application to the obligation of the United States to comply with the Fifth Amendment in this proceeding. *United States v. 1278.83 Acres in Mecklenburg County,* 12 F.R.D. 320.

Appellee further argued that the condemnation statutes do not authorize the adjudication of claims not arising out of the taking which the owner may have against the Government.

We have heretofore shown that there is a distinction between those claims which arise out of the taking and those which do not,

and have, we believe, shown conclusively that the claims of these interveners all arise out of the taking before the District Court.

That the United States may not be sued without its consent is elementary, but when the United States seeks to take private property under its power of eminent domain its obligation to make "just compensation" is no different from that of any other condemnor.

The assertion was made by appellee below that just compensation cannot be increased by the amount of tax liens nor can land be taken subject to such liens. This is the general rule and applies to tax liens. Assessments levied by private associations such as Park districts and Drainage districts where the obligation goes with the land, are not taxes, but in the nature of special assessments for local improvements and when lands subject to these assessments are taken by the federal government, it is not exempt from the payment thereof. Under the Declaration of Taking Act the court has power to make such orders with respect to "encumbrances . . . . assessments . . . . and other charges, if any, as shall be just and equitable." (Title 40 Sec. 258a USCA). *United States v. Aho,* 68 Fed. Supp. 358; *United States v. Florea,* 68 Fed. Supp. 367; *United States v. Certain Parcels in Fairfax County,* 89 Fed. Supp. 567 and 571; 196 F. 2d 657. Also see *United States v. Aho* 51 Fed. Supp 137.

The government may exercise its power of Eminent Domain on such terms and in such manner as it wishes, without interference from the Court, but it is the court's duty to see that owners receive, so far as is possible, just compensation for property taken from them. *United States v. 9.94 Acres of Land in Charleston* 51 Fed. Supp. 478. No construction of Rule 74(a) or any other rule or statute can take from a property owner the protection guaranteed to him by the Fifth Amendment.

It is not the duty of the plaintiff where the United States takes possession under a Declaration of Taking and pays into court the estimated value of the property taken to concern itself with the

distribution of that fund. That is the province of the Court. *United States v. 19,573.59 Acres of Land in Cheyenne County,* 70 Fed. Supp. 610, affd. 164 F. 2d 866, Cert. denied 334 U.S. 815, 92 L. Ed. 1745; *United States v.* EC¼ *Acres of Land in Brooklyn,* 176 F. 2d 255; *United States v. Adamant Co.* (supra).

Appellee in objecting to the filing of the Petition for Intervention submitted the following proposition:

> Rule 71A of the Federal Rules of Civil Procedure for the United States District Courts establishing procedure in condemnation of property in section (E) thereof precludes any pleading other than complaint and answer thereto.

Appellee here referred to paragraph (c) of Rule 71A which provides for a complaint, paragraph (e) which provides for an answer and concludes with the provision "no other pleading or motion asserting any additional defenses or objections shall be allowed."

This language was submitted by the United States as prohibiting the filing by petitioners of any pleading other than an answer which would be limited to those matters provided for in Rule 71A.

The inference is apparent that only a defendant may appear and he is limited by the rule to an answer and nothing more. No other pleading may be filed and therefore petitioners who are not defendants may not file any pleading.

This of course leads to the illogical conclusion that the United States may by simply refusing to name a property owner as a party defendant prevent him from appearing in the action. Clearly the Rule applies only to named defendants and not to those seeking intervention, and does not control other pleadings under other rules.

The Advisory Committee to the Supreme Court in referring to Subdivision (e) had this to say in their 1948 Report:

"COMMITTEE NOTE OF 1948.

"*Note to Subdivision (e)* Departing from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The general standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth. Merely by appearing in the action a defendant can receive notice of all proceedings affecting him. And without the necessity of answering a defendant may present evidence as to the amount of compensation due him, and he may share in the distribution of the award. See also subdivision (d)(2); Form 28." *Moore's Federal Rules 1951,* Page 349.

We wish to point to another provision of Rule 71A which provides that before any hearing involving compensation

"The plaintiff *shall* add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records....., and also those whose names have otherwise been learned."

It would appear that when the plaintiff becomes aware of the names of persons claiming compensation it is the duty of the plaintiff to join them. It would seem that the question as to whether such claimants possessed a just claim for compensation, should be determined by the Court rather than by plaintiff.

However, if the plaintiff refuses to name as a defendant one who has a right to claim compensation for property taken, such claimant not being a defendant could not be bound by a limitation designed to apply to those defendants named and should have the right to file such appropriate pleading as would permit a determination of the validity of his claim, under the general rules of pleading in Federal Courts.

Appellee also questioned petitioners' allegations as to the availability of other remedies and asserts:

Allegation that intervention is the only procedure by and under which relief can be had is without merit.

Here appellee offered interveners the questionable substitute for intervention by pointing out that the Tucker Act furnishes protection for "aircraft takings."

This may generally be true and the Tucker Act may furnish an alternative method to petitioners; however, we believe that at least as to those petitioners who are defendants, unless their claims are pressed in this proceeding they may be barred from thereafter seeking compensation for any such claims.

This argument was presented by the United States in *United States v. Chicago B&QR Co.* 90 F. 2d 161, supra and was approved by the court where it said:

> ". . . . that unless appellee presented all of its claims for proximate damages to its remaining property at the time of the physical appropriation of the land it would be barred thereafter from recovering those omitted." (Page 167).

It is recognized that the mere fact that there is another remedy available to interveners is no bar to intervention and that intervention is allowed to prevent a multiplicity of suits. *Clark v. Sandusky* 205 F. 2d 916. (C.C.A. 7.)

We wish finally to call attention to the principle of *res judicata* which might well be urged by the appellee in any subsequent action regarding compensation to these interveners and defendants.

It has been stated that:

> "The principle of *res judicata* will prevent subsequent litigation on questions of property interest which should have been raised in the condemnation at least so far as notice is concerned, constructive notice is sufficient, ..." *United States v. Winn* 83 Fed. Supp. 172.

It has also been held that an award of compensation under a state statute, is conclusive as to every matter which could have been included therein whether or not it was in fact included. *South Carolina Public Service Authority v. 11,754.8 Acres of Land* 123 F. 2d 738. (C.C.A. 4.) See *United States v. 16,572 Acres of Land* 49 Fed. Supp. 555.

In conclusion petitioners submit to the sound discretion of the court their right to present in this proceeding their claims for compensation for property and property rights which have been taken from them by this condemnation.

Neither Rules nor Statutes can deprive a property owner of just compensation when the government exercises its right of eminent domain and takes his property from him.

Here no denial is made that petitioners have suffered damage, in fact this is probably admitted, but says the United States these claimants should seek relief in separate actions, before separate juries and at some other time.

The stated purpose of Rule 71A was to eliminate uncertainty, waste of time, needless expense and to protect defendants. The allowance of a broad joinder of properties was to eliminate separate actions for each piece of property which had previously been unduly burdensome and served no useful purpose.

Surely 35 separate trials before 35 separate juries would serve no useful purpose and certainly it would be burdensome on the court as well as on both the United States and the claimants.

Respectfully submitted,

SNELL & WILMER

By Mark Wilmer